

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 1239

Docks

SPONSOR(S): Natural Resources Appropriations Committee, Agriculture and Natural Resources Policy Committee, Patronis

TIED BILLS:

IDEN./SIM. BILLS: SB 1118

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Agriculture & Natural Resources Policy Committee	10 Y, 0 N, As CS	Kliner	Reese
2)	Natural Resources Appropriations Committee	9 Y, 0 N, As CS	Smith Brown	Dixon
3)	General Government Policy Council			
4)				
5)				

SUMMARY ANALYSIS

CS/CS/HB 1239 incorporates several sections from CS/HB 7143, which passed the House but died in Senate Messages during the 2009 Regular Session. Specifically, the bill:

- Allows for roof structures over certain dock facilities in aquatic preserves;
- Removes the need for a variance for docks in certain shellfish waters;
- Directs the Department of Environmental Protection (DEP) to develop a list of activities for applicants to consider for meeting mitigation or public interest requirements;
- Allows DEP to expand the use of the online self-certification program and other forms of online authorization for appropriate exemptions, general permits, and individual permits by DEP and the water management districts if the expansion is economically feasible and requires a report;
- Prohibits local governments from specifying the method or form of documentation that a project meets the provisions for authorization under chapters 161, 253, 373, or 403, F.S.; and,
- Authorizes the use of different construction materials and minor deviations to allow upgrades to current structural and design standards for the replacement of docks.

The bill appears to have no fiscal impact on local governments. At the state government level, there may be an insignificant cost associated with rulemaking by DEP.

The bill has an effective date of July 1, 2010.

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

2009 Environmental Regulatory Reform

During the 2009 Regular Session, the Florida House of Representatives passed CS/HB 7143, which was an environmental regulatory reform bill that addressed myriad issues, including: construction, operating, and building permits; coastal construction permit applications; permitting of certain environmental restoration activities; docks; Florida-friendly landscaping; mining; home inspection; and elevator inspection.

CS/CS/HB 1239 incorporates several sections from CS/HB 7143, which passed the House but died in Senate Messages, which relate to the regulation and permitting of docks, environmental mitigation, and e-permitting.

Section 1 amends subsection (3) of s. 258.42, F.S., allowing boat slips in aquatic preserves to have a roof with an overhang not more than 1-foot beyond the footprint of the boat lift. Such roofs may not be considered to be part of the square footage calculations of the terminal platform.

Current Situation

Authorization is required for any construction or use on, over or under submerged lands owned by the state. Typical construction projects on sovereign submerged lands include docks, piers, seawalls and dredging of access channels. Activities and uses may be authorized by letter of consent, easement or lease, while some may qualify for consent by rule or an exception. The DEP serves as the regulator of activities over state-owned lands, while the Board of Trustees of the Internal Improvement Trust Fund (Board) serves as the proprietor of these state-owned lands and determines how the public's interests may best be served. The largest projects or ones of heightened public concern require review and

authorization by the Board, while staff of the DEP and the WMDs have been delegated the authority to take action on others.

Sections of Florida's coastal landscapes have been set aside for protection as aquatic preserves to ensure that the environment may be protected for bird rookeries, fish nurseries, freshwater springs, salt marshes, seagrass meadows, and mangrove forests. In 1975, Florida enacted the Aquatic Preserve Act to conserve the natural condition of these resources. Today, Florida has 41 aquatic preserves, encompassing almost two million acres. Part II of ch. 258, F.S., authorizes the Board's maintenance of these preserves. Rule 18-20, F.A.C., authorized by ch. 258, F.S., provides very specific directions and limitations on the type, size, and location of structures within aquatic preserves. For instance, Rule 18-20.004(5)(b)6., F.A.C., limits the terminal platform (the "T" at the end of the dock walkway) size to no more than 160 square feet. These strict guidelines are primarily for the maintenance of the natural conditions of the preserves, the propagation of fish and wildlife, and public recreation, including hunting and fishing where deemed appropriate by the Board and the managing agency.¹

Effect of Proposed Change

The bill permits boat slips in aquatic preserves to have a roof with an overhang not more than 1-foot beyond the footprint of the boat stored at the lift. Such roofs may not be considered to be part of the square footage calculations of the terminal platform. If a dock structure is currently exempt pursuant to s. 403.813, F.S., the exemption may be lost if the addition of a roof structure results in the structure exceeding the allowed square footage.

Section 2 amends s. 403.061(29), F.S., removing the need for a variance for docks in certain shellfish waters; creates subsection (40) of s. 403.061, F.S., requiring the DEP to develop a list of activities for applicants to consider for meeting mitigation or public interest requirements; prohibiting local governments from specifying the method or form of documentation that a project meets the provisions for authorization under chapters 161, 253, 373, or 403, F.S.; creates subsection (41) of s. 403.061, F.S., and, creates subsection (42) of s. 403.061, F.S., requiring the DEP to expand the use of online self-certification and other forms of online authorization for appropriate exemptions, general permits and individual permits by the department and the water management districts if the expansion is economically feasible and requiring a report submission of plan to the Legislature by February 15, 2011.

Current Situation

Docks in shellfish waters

Currently, certain activities that cause impacts to wetlands or other surface waters are exempt by statute and rule from the need for regulatory permits. To be exempt by rule, the activities must have been previously determined by the DEP to be capable of causing no more than minimal individual and cumulative adverse impacts to wetlands and other surface waters. Currently, s. 403.061(29), F.S., provides authorization to DEP to adopt by rule special criteria to protect Class II shellfish harvesting waters. People seeking to build a residential dock in shellfish waters are required to apply for a variance for a permit from the DEP. However, according to the DEP, the Florida Department of Agriculture and Consumer Services, the agency that regulates the harvesting of shellfish, does not comment on such variances unless the proposed dock contains more than 10 slips. This routinely causes a delay in the project that might be avoided if the variance procedure was superseded by administrative rule.

Mitigation

The Florida Legislative Committee on Intergovernmental Relations (LCIR) in March, 2007, issued an interim project report titled *Improving Consistency and Predictability in Dock and Marina Permitting*. This concluded a 2-year project to review current permitting practices and identify opportunities to improve the consistency and predictability in the permitting of water related facilities in Florida.

¹ Administrative case law holds that dock structures having roofs "not completely closed in and/or climatized for human habitation are deemed to be water dependent activities" and are included in the calculation of square footage for pre-empted areas. *Sutton v. Hubbard*, 17 FALR 3492, 3497 (Fla. DEP 1995).

According to the LCIR report, a proposed marine construction project, for instance, is subject to regulatory mitigation requirements, and, if the project involves state submerged lands it is subject to proprietary or public interest mitigation requirements as well. Regulatory mitigation is essentially an action or series of actions to offset the adverse impacts to the environment from the proposed project. In contrast, public interest mitigation may be viewed as compensation to the state and the citizens of Florida for use of sovereignty submerged lands in addition to actions to offset adverse impacts to sovereign lands and associated resources from the proposed project. A common concern of DEP staff, as well as local governments and marine contractors and consultants, is that identifying appropriate projects or activities to serve as mitigation continues to be based on guesswork and time consuming negotiations with permit applicants. According to the LCIR report, the marine construction industry contends that permitting staff require the applicant to suggest a project or set of activities to meet the public interest and/or mitigation requirements only to be told that the proposed activities are insufficient. While the expense of public interest and regulatory mitigation activities are sometimes identified by marine contractors as excessive relative to the type, size, and location of the proposed project, the most frequently cited problem in interviews and surveys is the uncertainty and unpredictability of what will be acceptable.

E-permitting:

The DEP currently accepts certain types of permit applications on-line and provides an online self-certification process for private docks associated with detached individual single-family homes on the adjacent uplands, provided the dock being constructed is the sole dock on the parcel. Through this electronic process, one may immediately determine whether a private single family dock can be constructed without further notice or review by the DEP. This includes notification of qualification for the U.S. Army Corps of Engineers' State Programmatic General Permit (SPGP IV). In addition, Florida's five WMDs have designed and support a shared permitting portal. This portal is designed to direct the user to the appropriate WMD's Web site for obtaining information regarding the WMD's permitting programs, applying for permits, and submitting permit compliance information. The WMDs issue several types of permits. The three most common permits deal with how much water is used (consumptive use permits), the construction of wells (well construction permits), and how new development affects water resources (environmental resource permits (ERPs)).²

Self certification:

According to the LCIR report, in interviews with stakeholder groups, some local governments often do not accept self-certification for permit-exempt projects identified in statute, rule, or listed in the DEP's Self-Certification Process for Single-Family Docks. Some local governments require a "signature" from DEP permit review staff to verify the exempt status of the projects submitted under Self-Certification, notwithstanding the fact that current law neither requires nor provides for a "signature" from the DEP as an alternative or as supplemental to Self-Certification.

Effect of Proposed Change

Docks in shellfish waters

The bill authorizes the DEP to amend its rules to include special criteria for approval of docking facilities with 10 or fewer slips where construction and operation of such facilities will not result in the closure of shellfish waters. The language adds a reference to Class III waters because there are Class III approved shellfish waters to which the same rules apply. Deletion of the reference to the Environmental Regulation Commission (ERC) is a technical correction that recognizes that elsewhere in statute the ERP rules are exempted from ERC review.³

Mitigation:

The bill directs the DEP to identify projects and activities that serve as regulatory and public interest mitigation for all environmental permitting. The bill declares the contents of such a list are not a rule as defined in chapter 120, F.S., and listing a specific project or activity does not imply approval by the DEP for such project or activity. In addition, each county government is encouraged to develop an inventory of projects or activities for inclusion on the list by obtaining input from local stakeholder groups in the

² See: <http://www.flwaterpermits.com/>

³ According to the DEP, this reference to the ERC is outdated and has been superseded by statute.

public, private, and nonprofit sectors, including local governments, port authorities, marine contractors, other representatives of the marine construction industry, environmental or conservation organizations, and other interested parties. Counties may establish dedicated funds for depositing public interest donations into a reserve for future public interest projects, including improvements to on-water law enforcement.

E-permitting

The bill requires DEP to expand the use of online self-certification program and other forms of online authorization for appropriate exemptions, general permits, and individual permits by the department and the water management districts if the expansion is economically feasible. The plan must be submitted to the President of the Senate, the Speaker of the House of Representatives, and the Legislative Committee on Intergovernmental Relations by February 15, 2011.

Self-certification:

The bill prohibits a local government from specifying the method or form of documentation that a project meets the provisions for authorization under chapters 161, 253, 373, or 403, F.S., including Internet based programs of the DEP or WMDs that provide for self certification. The bill encourages the DEP and the WMDs to expand the use of Internet based self-certification services for appropriate exemptions and general permits.

Section 3 amends s. 403.813, F.S., clarifying the language exempting from permit the repair or replacement of docks.

Current Situation

Although not part of the LCIR findings in the report dated March, 2007, marine industry representatives contend there are occasions when it is counterintuitive to rebuild a damaged or destroyed dock or pier to its prior configuration if the prior configuration was of poor design or placement. If there are minor deviations that are proposed in writing to the DEP or a WMD prior to construction, however, either the DEP or the WMD may exempt the construction or repair if the agency determines it will have only minimal or insignificant individual or cumulative adverse impacts on the water resources of the WMD. According to the DEP, reasonable flexibility is routinely provided. For instance, the DEP will not preclude anyone from building a smaller dock, or reconstructing a dock so it is higher over the water, or using the latest structural standards for reconstruction or replacement.

Section 403.813(2)(d), F.S., provides the criteria required for a permitting exemption for the replacement or repair of an existing dock or pier provided no fill is used, and the dock or pier is in the same location, configuration and dimension of the dock or pier being replaced or repaired. As this exemption applies to a single family dock as well as a marina, the DEP reports that it is important not to increase or change the "footprint" over sovereignty submerged lands, as this would necessarily require a review by the DEP to discern the potential environmental impacts.

Effect of Proposed Change

The section authorizes the use of different construction materials or minor deviations to allow upgrades to current structural and design standards in the repair or replacement of dock structures.

Section 4 provides an effective date.

B. SECTION DIRECTORY:

Section 1. Amends s. 258.42, F.S., providing for roof structures over certain dock facilities.

Section 2:

- Amends s. 403.061(29), F.S., removing the need for a variance for docks in certain shellfish waters;
- Creates s. 403.061(40), F.S., requiring the DEP to develop a list of activities for applicants to consider for meeting mitigation or public interest requirements; prohibiting local governments

from specifying the method or form of documentation that a project meets the provisions for authorization under chapters 161, 253, 373, or 403, F.S.;

- Creates s. 403.061(41), F.S., requiring the DEP to expand the use of online self-certification and other forms of online authorization for appropriate exemptions, general permits and individual permits by the department and the water management districts if the expansion is economically feasible and requires a report; and,
- Creates 403.061(42), F.S., addressing self-certification - Notwithstanding any other provision of law a local government is prohibited from specifying the method or form of documentation that a project meets the provisions for authorization under chapters 161, 253, 373, or 403, F.S.

Section 3. Amends s. 403.813, F.S., regarding the repair or replacement of docks.

Section 4. Provides an effective date of July 1, 2010.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The DEP is currently using monetary and staff resources to expand self-certification capabilities. The bill authorizes the DEP to promulgate rules to allow docking in shellfish waters and there may be associated insignificant costs.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Dock owners in aquatic preserves will be able to erect roofs over their docks, boat lifts and davits. Additionally, owners may replace or make minor repairs and structural changes to their docks without getting permits.

Those who need to comply with mitigation requirements may be able to consult a list of activities for applicants to consider for meeting mitigation or public interest requirements that is developed by the DEP.

Docking facilities of 10 or fewer slips may be erected in class II and class III waters if the construction and operation of the facility does not result in closure of the shellfish harvesting waters. Allowing this change may streamline the dock facility permitting process in shellfish harvesting waters.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to: require counties or municipalities to spend funds or take an action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill authorizes the DEP to amend its rules to provide criteria for approval of docking facilities in shellfish waters.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

On March 11, 2010, the Agriculture and Natural Resources Committee adopted three amendments offered by the bill sponsor. The first amendment specifies that docks located in aquatic preserves may be roofed provided the roof does not overhang more than one foot beyond the footprint of the boat stored at the lift. The original bill language allowed a roof that does not overhang more than one foot beyond the footprint of the lift. The second amendment clarifies the DEP's authority to adopt rules to protect Class III shellfish waters. The third amendment removes the requirement that DEP develop a project management plan to implement e-permitting, and removes the requirement that e-permitting contain compliance information. The DEP is required to continue to implement an e-permitting program.

On March 26, 2010, the Natural Resources Appropriations Committee adopted an amendment deleting the section allowing DEP to develop an e-permitting program and replaces it by allowing DEP to expand the use of the online self-certification program and other forms of online authorization for appropriate exemptions, general permits, and individual permits by the department and the water management districts, if the expansion is economically feasible. The amendment also requires DEP to report on the progress of these activities to the President of the Senate, the Speaker of the House of Representatives, and the Legislative Committee on Intergovernmental Relations by February 15, 2011. The bill as amended was reported favorably as a committee substitute.